of such reassignment". The Commission also provided compulsory arbitration if there was any disagreement over this protection that might arise between the bus company and the union. In February, 1965, the Commission denied a petition for a reconsideration. Both Amalgamated, in Civil Action No. 684-65, and American Buslines, in Civil Action No. 644-65, attack this order.

In the *Overnite* proceedings, the Commission approved the purchase by Overnite of Rutherford Freight Lines, "in view of vendor's declining traffic and revenues and the resulting trend toward substantial deficits which, if continued, will result only in its demise as a carrier". The Commission rejected the argument of the Teamsters Union that the transaction be denied on the grounds that Overnite was a non-union motor carrier and approved the transaction, subject to the customary protection in motor carrier cases of three months' severance pay payable to the adversely affected employees, which it found to be just, reasonable and adequate protection.

The following statutes are involved:

Section 5(2)(c) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(c)—In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) the effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

Section 5(2)(f) of the Act, 49 U.S.C. § 5(2)(f)—As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Com-

mission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

The defendants, The United States of America and the Interstate Commerce Commission, suggests that the questions raised by these three consolidated cases are as follows:

1. Does the Commission policy to protect motor carrier and railroad employees differently have a rational basis and warrant in the statute?

2. Is the protection granted the motor carrier employees in the two purchase transactions before the Court fair and equitable both to the employees and the involved motor carriers?

3. Does the Commission have statutory authority to require compulsory arbitration of disputes over the protection it affords employees as a condition to its approving a transaction under Section 5 of the Act?

We agree.

Motor carrier employees do not need very much financial protection from the adverse effects of Section 5 transactions, for they move in an expanding industry and possess quite a degree of transferability within the industry itself. We also agree with the Commission that "the skills of motor carrier employees are more adaptible (sic) than the more technical and limited skills of most railroad employees". Displaced railroad employees meet with more difficulties in obtaining similar positions and, therefore, they need more protection than do motor carrier employees.

The standard of fair and equitable protection which the Commission must grant to motor carrier employees will not be found in the standard established for railroad employees. While Section 5(2)(f) of the Act requires certain minimum financial protection over a period of four years to railroad employees, no such requirement has ever been enacted by the Congress for motor carrier employees. In the railroad cases, the minimum protection is prescribed by the statute, and discretion is given only to increase such protection, while in the motor carrier cases, no minimum is prescribed by the statute, for the statute only grants a discretion to award protection to motor carrier employees that is fair and equitable.

The Commission was not required to follow the mandate of the Congress regarding the minimum protection granted railroad employees as a guide to the minimum protection for motor carrier employees. We cannot say that, under the circumstances of these cases, the motor carriers' employees involved are so similarly situated to railroad employees as to entitle them to more protection than the Commission has awarded them.

We hold, therefore, that the policy of the Interstate Commerce Commission to protect employees affected by financial transactions between motor carriers differently from employees where railroads are involved is supported by a rational basis and is authorized in the statute.

In the *Midwest Buslines* case, the employees are protected from the adverse effects which resulted from the transaction, while in *Overnite*, the protection extends to employees in a transition from one job to another in the motor carrier industry. In *Overnite*, the Commission found that three months' severance pay would provide "benefits to dismissed employees for a long enough period that aggressive job-hunting should be successful". It found, further, that three months pay would not impose "such a burden on vendee as to imperil its financial stability or as to preclude consummation".

The only financial loss to employees that the Commission could here attribute to the Midwest Busline occurred with its employees who were required to change their place of residence following the strike. Congress has prescribed no minimum statutory criteria for motor carrier employees, for the only standard is whether the particular protection of each case is fair and equitable in the circumstances. The majority of the Commission has granted only such protection as the employees would have been entitled to had they followed their work, and such protection seems fair and equitable to employees of American Buslines.

We hold, therefore, that the protection given to motor employees of the two proceedings before the Court is fair and equitable to both the employees and the involved motor carriers.

In Civil Action No. 644-65, American Buslines take the position that the Commission has no authority to direct that disagreements over the amount of a particular lump-sum settlement be submitted to binding arbitration. This argument has no legal efficacy for the Commission's power to require binding arbitration has previously been sustained. See *New Orleans and Northeastern Railroad Co.* v. *Bozeman*, 312 F. 2d 264 (5th Cir. 1963). The subject of arbitration will not be any labor-management matter, nor, as this Court has already decided, any matter foreclosed

by the strike settlement agreement. The Commission requires only that disputes over the exact amount of lump-sum payments due particular individuals be submitted to an arbiter.

We hold, therefore, that the Commission may lawfully require compulsory arbitration of disputes over the protection granted employees as a condition to its approving a transaction under Section 5.

The three consolidated actions are dismissed and the two decisions of the Interstate Commerce Commission are sustained. This opinion constitutes the findings of fact and the conclusions of law, and counsel for the United States and the Interstate Commerce Commission shall submit an appropriate order not inconsistent with this opinion.

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## APPENDIX B

No. MC-F-7041[1]

MIDWEST BUSLINES, INC.—PURCHASE (PORTION)—AMERICAN BUSLINES, INC.

Decided August 17, 1964

Upon reconsideration, findings in the prior reports, 80 M.C.C. 681, and 90 M.C.C. 173, modified.

Additional appearances: *Frederick S. Hill, William B. Devaney,* and *Robert J. Corber,* for intervener, and *William B. Peer* for protestant.

### Report of the Commission on Reconsideration

TUGGLE, *Commissioner:*

In the initial report, 80 M.C.C. 681, decided November 12, 1959, purchase, for a total amount of $625,000, by Midwest Buslines, Inc., hereinafter called Midwest, in No. MC-

[1] This report embraces No. MC-F-7042, Continental Tennessee Lines, Inc.—Purchase (Portion)—American Bus Lines, Inc.

F-7041, and by Continental Tennessee Lines, Inc., hereinafter called Continental, in No. MC-F-7042, of separate portions of the operating rights and certain property of American Buslines, Inc., hereinafter called American, and the acquisition of control thereof, through the transactions, in the first transaction by Trammel Crow, and in the second transaction, by Continental Southern Lines, Inc., and in turn, by Transcontinental Bus System, Inc., was approved and authorized subject to certain conditions. One of the conditions reserved jurisdiction for a period of 3 years from the dates of consummation, to make such adidtional findings and impose such terms and conditions with respect to employees as might be necessary and lawful, if, upon petition by such employees or their representatives within that period, it was shown that the condition of their employment or interests incident thereto had been or would be adversely affected by anything done, or proposed to be done, pursuant to, or as a direct result of, consummation of the transactions.[2] It was also provided that consummation of the transactions would be considered as acceptance of the reservation of jurisdiction. Both transactions were consummated on December 31, 1959.

As a result of a petition filed April 11, 1960, by Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL-CIO, hereinafter called Amalgamated, the proceedings were reopened by order of September 20, 1960, for further hearing for the limited purpose of affording an opportunity for the presentation of evidence showing specifically how, and to what extent, particular employees of the carriers concerned have been adversely affected within the meaning of the reservation condition.

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[2] At the time of the initial hearing in this matter, the employees of American were on strike.

In the report after further hearing, 90 M.C.C. 173, decided March 26, 1962, division 3, in denying the relief sought, stated:

> Assuming that the affected employees were not bound to accept the offers of Midwest and Ct, and that the rejection of such offers and the signing of the release of July 31, 1959, does not constitute a bar to the assertion of claims by the affected employees against American, there still can be no presumption that, except for consummation of the considered transaction, they immediately could have returned to work on their old runs. The strike seriously disrupted American's business and it is logical to assume that some time elapsed before it resumed full scale operations. Also, notwithstanding the furlough procedure required in the new agreement, it seems clear that all of the affected employees were in a position to obtain the necessary furlough, and to accept immediate employment in the eastern district at wage rates exceeding rates paid on the considered runs prior to the strike. Many earned more after than before the strike and no employee was required to accept a lower wage rate or to remain without work except by choice. While there is some indication that those transferring from the central district were subject to recall, and Elmore testified that he was recalled, the latter could have remained in the eastern district. His return also was a matter of choice.
>
> Considering the fact that the strike was a contributing factor to American's financial difficulties, that Amalgamated and the employees were well aware thereof and of the adjustments which would be necessary when they returned to work, that testimony was adduced indicating the matter of indemnification for lost wages and expenses was discussed and American was adamant in refusing to make any arrangements

> therefor, that no provision was made in the new agreement to compensate employees therefor, and that the employees otherwise won favorable terms, there is ample reason to conclude that the strike was settled on such basis and that the requirements of the conditions Amalgamated now seeks to have us impose as a condition to approval herein would tend to subvert the terms of the settlement reached by the parties.

The conditions sought by Amalgamated are set forth in appendix A to the report after further hearing and need not be repeated here.

Following denial of its petition, an action was brought by Amalgamated, as the collective bargaining representative of the employees of American, in the United States District Court for the District of Columbia, seeking to set aside the order of March 26, 1962, and to require the Commission to attach conditions to its order which would protect those employees against such losses as may have been incurred, or might in the future be incurred, as a result of the approval of the transactions. The court stated:

> In July of 1959 plaintiff and American Buslines, Inc., entered into an agreement as part of the strike settlement. In that agreement American Buslines, Inc., released all claims against the plaintiff and the plaintiff released American Buslines, Inc.
>
> > "from all sums of money, accounts, actions, suits, proceedings, claims unfair labor practice charges and demands, of whatever character or description which Amalgamated International from time to time had or has up to date of this release by reason of any account, cause, matter or thing."
>
> The Commission concluded that the employees' claims for protection now being made were waived by this agreement between the union and the American Buslines, Inc. We disagree. That agreement was

made as part of the strike settlement and covered claims "arising out of that strike and activities relating thereto." The claims now being made arise, in our view, out of the sale of the bus route to Midwest Buslines, Inc., rather than out of the strike "and activities related thereto."

The Commission also concluded that the offers of employment made by Midwest Buslines, Inc., to the striking employees of American Buslines, Inc., had the effect of defeating any right of those employees to protection in connection with the sale. The evidence before the Commission indicated that the job offers were rejected because the men would be paid at the rate for beginning operators; that they would be considered as "new employees"; that their seniority "would rank as of the time they first performed compensated service" with Midwest Buslines, Inc., and that the only seniority protection offered was the right to continue the existing ranking they had in picking the assignments on the Kansas City to Memphis route. These offers, we think, were inadequate.

The grounds on which the Commission relied in denying relief were accordingly erroneous, and its order must be set aside. *Cf. Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 88, 94, 95 (1943).

The case will be remanded to the Commission for further proceedings not inconsistent with this opinion. We need not here attempt to delineate what measure of relief, if any, should be provided to the employees of American Buslines, Inc. That is a subject reversed, subject to judicial review, for the determination of the Commission in the first instance. But we think that if any particular measure of relief is one which would ordinarily be granted to railroad workers similarly situated, the Commission should not deny it to the employees of American Buslines, Inc., without a rea-

soned explanation of its denial, consistent with what has here been said. *Cf. Eastern Central Motor Carriers Association* v. *United States,* 321 U.S. 194, 210 (1944).

The proceedings were reopened for reconsideration on the existing record by order dated August 12, 1963.

By petition filed November 4, 1963, the National Association of Motor Bus Owners (the association), sought permission to intervene for the limited purpose of filing a brief on the questions of whether the application of labor protective conditions in the sale of motor carrier properties is mandatory in all cases, and whether labor protective provisions similar to those given rail employees are required by section 5(2)(c). By order of November 26, 1963, it was authorized to intervene for the limited purpose of filing the brief.

In its brief, the association asserts that labor protective provisions have been imposed in proceedings involving rail carriers on the basis of various considerations, none of which are applicable to the motor carrier industry, and that among these considerations were the following: (1) "The Government policy of sponsoring, promoting and sometimes ordering railroad consolidations, largely because of over-extension and control and manipulation of rail securities by financial operators;" (2) that a large portion of rail operating employees possess long training and skills that can ordinarily be used only in the railroad industry and are not readily adaptable to other types of jobs, while exactly the reverse is true in the motor carrier industry, where drivers constituting 50 percent of the total employment, have skills which are readily transferable to the operation of any type of motor vehicle, and that, likewise, the mechanics, dispatchers, clerks, and other employees are also readily adaptable to similar jobs in other industries; (3) that the very heavy impact of pressure from the rail-

road brotherhoods during the 1930's was largely instrumental in the adoption of legislation to protect railway labor, as distinguished from labor in general, in railroad mergers and consolidations; (4) that absorption of labor protective costs in railroad mergers and consolidations was not prohibitive because of the inherent financial strength of the railroad industry; and (5) that imposition of special mandatory labor protective conditions for railroad employees occurred only after the rail brotherhoods and railroad management had voluntarily entered into a negotiated agreement which largely provided identical relief. It argues that none of these considerations is properly applicable to the conditions under which the motor carrier industry operates; that there is no ambiguity or uncertainty with respect to the scope and application of section 5(2)(f), which is clearly limited to transactions involving carriers by railroad; and that section 5(2)(c) neither specifically nor by implication makes any reference to section 5(2)(f), but requires only that the Commission "give weight" to the interest of the carrier employees affected. It finally asserts that the Commission has gone somewhat further than the literal language of section 5(2)(c) to require that fair and equitable treatment be accorded motor carrier employees, but argues that "fair and equitable treatment" means, as the Commission has consistently found, conditions which are fair and equitable under the circumstances of a given case.

In reply, Amalgamated contends that the Commission has stated its position in terms which in no way turn upon the issue of whether the act requires the imposition of the same protective conditions for motor carrier employees as it does for railroad employees. It asserts that in *Hudson Bus Lines, Inc.—Pur.—Boston & Maine Transp. Co.*, 58 M.C.C. 133, the Commission made it clear that in motor carrier cases the employee protective conditions necessary to assure fair and equitable treatment were those imposed in *Oklahoma Ry. Co. Trustees Abandonment*, 257 I.C.C.

177, and *Chicago, B. & Q. R. Co. Abandonment*, 257 I.C.C. 700, hereinafter called the Oklahoma and Burlington conditions, respectively. Amalgamated also contends that the Commission reaffirmed the appropriateness of the railroad conditions for motor carrier employees in *Short Line, Inc. —Purchase—New England Transp. Co.*, 70 M.C.C. 459, and that the Commission, in the instant proceedings, again referred to the *Oklahoma* and *Burlington* conditions as furnishing the guide for protection of motor carrier employees.

Amalgamated argues that, in short, it makes no difference for the purposes of the instant proceedings whether section 5(2)(c) *requires* the same employee protective conditions for motor carrier employees as are required by section 5(2)(f) in the case of railroad employees, since the Commission has already decided, and reaffirmed in these proceedings, that, in effectuating the statutory obligation to provide fair and equitable treatment for motor carrier employees, "the conditions imposed in rail proceedings would be used to protect motor carrier employees in appropriate cases". It asserts that the Commission decided that for certain stated reasons this was not an "appropriate case" in which to apply any protective conditions, but that the court reversed the Commission on the ground that none of the reasons relied upon by the Commission warrant its refusal to protect the employees involved. Amalgamated contends that with the case in this posture, the Commission is commited to the proposition that, but for the reasons relied upon in its decision, it would have applied the rail conditions here, and that, therefore, the sole remaining task before the Commission is to establish for the employees involved, the measure of protection to which they are entitled. It finally argues that the reasons urged by the association in its brief for not imposing conditions are not supported by the record, have never been raised heretofore, and are without merit.

Before discussing the merits of the various contentions, a brief resume of the events which preceded and followed the commencement of these proceedings is necessary to delineate the status of the employees involved as of the time of the further hearing. It is unnecessary to repeat all the facts, which are adequately and correctly set forth in the prior reports of division 3 and the hearing examiners.

Following prolonged contract negotiations, during which the employees of American continued to work under the terms of an expired contract for approximately 17 months, Amalgamated and American failed to reach a new agreement, and American's employees were called out on strike July 1, 1958. As a result of the strike, and of substantial operating deficits for the period 1933 through August 1958, as explained more fully in the examiner's report following the initial hearing, American decided to dispose of portions of its operating rights and properties to raise sorely needed capital and to curtail the scope of its operations. In addition to the operating rights and properties sold in the instant proceedings, certain other operating rights and properties were disposed of in other proceedings.[3]

By orders of December 3, 1958, Midwest and Continental were authorized to temporarily lease separate portions of American's operating rights authorizing operations between Kansas City, Mo., and Memphis, Tenn., and between

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[3] No. MC-F-7044, *Continental Pacific Lines—Pur.—American Buslines, Inc.*, decided May 22, 1959 (not printed), and No. MC-F-7467, Transcontinental Bus System, Inc.—Control—Denver-Colorado Springs-Pueblo Motor Way, Inc., and Denver-Salt Lake-Pacific Stages, Inc., which embraced No. MC-F-7247, Denver-Colorado Springs-Pueblo Motor Way, Inc.—Purchase (Portion)—American Buslines, Inc., reported in *Transcontinental Bus Sys...., Inc.—Control,* 85 M.C.C. 383. In No. MC-F-7467, American disposed of its capital stock interest in the two last-named carriers. These applications were filed November 20, 1958, February 29, 1960, and July 6, 1959, respectively. Each of these transactions has been approved and consummated.

Memphis and Chattanooga, Tenn., respectively. Each offered employment to all of American's drivers utilized on the considered routes prior to the strike without seniority and at the beginner's pay scale prescribed in their respective union contracts with the Brotherhood of Railroad Trainmen, and with a local of Amalgamated different from that representing the drivers of American. Seven of the drivers went to work for Continental on the Memphis-Chattanooga run, but the remainder formerly operating that run refused the proffered employment, as did the drivers formerly employed on the Kansas City-Memphis run, upon being advised by Amalgamated that acceptance of employment with either Midwest or Continental would constitute strike breaking.

For the purpose of seniority, American's operations were divided into two divisions which, in turn, were subdivided into districts. The Kansas City-Memphis route was in the central district and the Memphis-Chattanooga route constituted the entire southern district of the same division. The latter district was completely eliminated by the sale of that route to Continental, leaving the drivers employed thereon without a home district for seniority purposes.

American and Amalgamated eventually executed a new labor-management agreement on July 18, 1959, supplemented by a further agreement dated July 31, 1959, in which American and Amalgamated agreed to release all claims against each other to that date. The strike finally terminated on August 1, 1959, and, by mutual consent, Amalgamated and American agreed that during the period of transition, while American was attempting to return its operations to normal and because the drivers were scattered all over the country, the seniority provisions of the agreement would not be strictly adhered to for a short period of time, and the drivers formerly on the routes sold could accept any work open to them wherever the jobs

might be. The new agreement made no provision for compensation to the drivers, from either route sold, for expenses incurred in moving to other districts.

Of the 21 active drivers employed on the Kansas City-Memphis route, 14 returned to work for American following settlement of the strike. Of the 19 active drivers on the Memphis-Chattanooga route, 7 accepted employment with Continental upon its commencement of temporary operations, and 8 returned to work for American following the resumption of operations after settlement of the strike. All of the affected employees were offered employment by American in August 1959, but a number refused. The offer was repeated in December 1959, and again some refused until April 1960, following advice from American that they should either return to work or forfeit all their seniority rights. Amalgamated is concerned only with the 22 drivers who returned to work with American.

On the termination of the strike and thereafter, American offered jobs in its eastern district to all the returning drivers. Some of these, however, refused such employment, and as a consequence thereof earned less wages after the strike than before the strike. "Each of the 22 employees had sufficient seniority to take the higher paying jobs, but some preferred to ride-out bids and not move to the carrier's eastern district. Those who did move, however, earned more after the strike than before the strike. The details concerning these offers by American, including the higher wages that might have been earned had the returning drivers accepted the available employment in American's eastern district, are set forth in the prior report."

The 14 drivers employed on the Kansas City-Memphis route were all based at Springfield, Mo., prior to sale of the route to Midwest. After their return to work, following settlement of the strike, all of the drivers except one, who was voluntarily furloughed, were placed in jobs with

American in the eastern, central, and western districts. The eight drivers employed on the Memphis-Chattanooga route were based at Florence, Ala., and Memphis and Chattanooga prior to its sale to Continental. Upon their return to work following the strike, with no home district remaining, seven were initially assigned to the eastern district, working out of Pittsburgh, Pa., and one to the western district, at his own request, working out of Los Angeles. The moves required by these reassignments resulted in expenses the drivers would not have incurred had they been reassigned to their pre-strike positions, including loss of pay while moving, the temporary maintenance of two households, increased rents and utilities costs in some instances, and storage and/or moving expenses. In addition to the direct effect of the transactions on the drivers formerly employed on the considered routes, certain drivers, junior in seniority and on more attractive runs, were collaterally affected by being "bumped" by the returning drivers, and they, in turn, "bumped" other drivers junior to them, some losing pay in the scramble for positions following settlement of the strike. However, no driver was dismissed as a result of the quest for positions. The assignment of the central district drivers to the eastern district was on a temporary basis, and they remained subject to recall. If recalled, they were required to return or forfeit their home district seniority. In the latter event, for seniority purposes, they would then be regarded as a new employee in the eastern district as of the time of the original assignment there. A recall would naturally result in the incurrence of additional expense for a driver on returning to his home district.

### Issues and Applicable Law

It is clear that the drivers formerly employed on the routes acquired by Midwest and Continental have been adversely affected by the transactions. The questions for determination now are, (1) what measure of relief, if any,

should be provided those employees for the adverse effects on them flowing from the transactions, and (2) if a particular measure of relief is one which would ordinarily be granted to railroad workers similarly situated, should the same measure of relief be granted to the motor carrier employees here involved?

The protection which should be afforded carrier employees involved in section 5 proceedings has not, in motor carrier transactions, been subject to any fixed rule or formula, but rather has been determined upon the circumstances present in each case. Section 5(2)(c) provides that, "In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall *give weight to* the following considerations, among others: (1) the effect of the proposesd tranaction upon adequate transportation service to the public; * * * and (4) the interest of the carrier employees affected." Section 5(2)(f), however, provides that "As a condition to its approval, under this paragraph (2), of any transaction involving a *carrier or carriers by railroad* subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the *railroad employees* affected." And it further provides:

> In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the *carrier or carriers by railroad* affected by such order being in a worse position with respect to their employment, * * * [Emphasis supplied].

In the *Hudson Bus* case, *supra*, it is true that we referred to the conditions imposed in the *Oklahoma* and *Burlington* cases, and suggested that the parties use those cases as a guide in reaching an agreement with respect to the protection to be afforded the employees. We did not impose

those requirements as a condition in that case, however, but reserved jurisdiction, applicable only to vendor, for a period of 3 years to make such additional findings and impose such terms and condition with respect to employees of the vendor as might be necessary, if, upon petition by such employees or their representatives, within the reserved period, relief was shown to be warranted. In the *Short Line* case, *supra,* we stated that the issues therein were governed by the decision in the *Hudson Bus* case, and also reserved jurisdiction for a period of 3 years. On reconsideration, 75 M.C.C. 33, we there found that:

> The protection which should be afforded employees of carriers involved in section 5 proceedings is not subject to any fixed rule or formula but, rather, is a matter for determination based upon the circumstances present in each case. For example, section 5(2) makes a distinction between employees of railroads, on the one hand, and employees of motor carriers, on the other. Under paragraph (f) of that section it is mandatory that certain conditions be imposed for the protection of railroad employees. As to motor carriers, however, paragraph (c) provides that the interests of motor-carrier employees is only one of several elements to which weight must be given. Although not set forth as a specific directive as in the case of railroad employees, the act, taken as a whole, in our opinion, makes clear the congressional intent that public policy demands fair and equitable treatment of employees of motor carriers involved in section 5 proceedings.
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> • • • The record here, however, definitely shows that at least 5 of vendor's employees would be adversely affected as a result of consummation of the instant transaction under the terms and conditions proposed by applicants. The question is thus presented whether the interests of those employees should be given con-

trolling weight paramount to all other public-interest considerations or whether, in the light of the evidence showing that vendor is presently engaged in a retrenchment program because of continuing deficits and is furloughing employees in order to relieve the strain on its gradually worsening financial condition, it would be more in the public interest that a condition be imposed which would provide an equitable balance between the interests of the carriers involved, their employees, and the public.

* * * instead of reserving jurisdiction for a period of 3 years as set forth in the prior report, a condition should be imposed spelling out the protection deemed reasonable under the circumstances here presented. Considering all the evidence, we are of the opinion that any employee of vendor separated from his job because of consummation of the instant transaction should receive as a result thereof during the period in which he is unemployed, but for not to exceed 3 months, severance pay at the rate of his average monthly pay for the 12 months immeidately preceeding the month in which the transaction is consummated.

In *Baggett Transp. Co.—Purchase—Hunt Freight Lines, Inc.*, 75 M.C.C. 147, on reconsideration, we found:

The mandatory provisions of section 5(2)(f) concerning protection to employees, by their express terms apply only to rail carrier employees and not to employees of motor carriers. As to motor carrier employees, paragraph (c) requires that we give weight to and consider the effect the transaction would have on them, this being only one of the several elements specified in that paragraph to which weight must be given.

In that proceeding, we again imposed a condition requiring the payment of 3 months' severance pay to employees dis-

placed as a result of the transaction. In the report on further hearing, 87 M.C.C. 235, in affirming the findings in the prior reports, we stated that "it has been the established policy of the Commission to go no further than to require 3 months' severance pay for displaced employees."

Thus, it is apparent that Amalgamated's contention that the Commission has made it clear that the employee protective conditions *necessary* to assure fair and equitable treatment of motor carrier employees are those prescribed in the *Oklahoma* and *Burlington* cases, does not stand up under examination of the reports in which those cases have been cited. As indicated, in the *Hudson Bus* case, we merely suggested that the parties consider the *Oklahoma* and *Burlington* conditions as guides to the solution of their differences, and, as pointed out in the prior report after further hearing, in no instance has the Commission imposed such conditions where only motor carrier employees were involved.

While we are convinced that our interpretation in the cases cited and in the prior report of the distinction between the mandatory provisions of section 5(2)(f), applicable to railroad employees, and the wholly discretionary provisions applicable to motor carrier employees, is sound, an examination of the legislative history of the Transportation Act of 1940, clearly supports that interpretation. A committee, composed of six members representing railroad labor and management, appointed by the President of the United States, to consider the transportation problem and recommend legislation, in its report of December 23, 1938, to the President, recommended, among other things, the creation of a Transportation Board, and, in discussing railroad consolidations, stated:

> After the details of any proposed consolidation have been determined by the interests involved, they should be embodied in an application for approval, addressed to the Transportation Board. In passing upon such

an application, the Board should be governed by the following considerations:

* * * * * * * * *

(d) The interests of the employees affected. The Board shall examine into the probable results of the proposed consolidation and require as a prerequisite to its approval, a fair and equitable arrangement to protect the interests of the said employees.

Report No. 433 from the Senate Committee on Interstate Commerce dated May 16, 1939, regarding the proposed legislation, in discussing railroad consolidations, stated:

> Another important change which would be accomplished by section 49 of the bill is to be found in paragraph (3), (b), and (c). It is there provided * * * that the Commission shall require, as a prerequisite to its approval of any proposed transaction under the provisions of section 49, a fair and equitable arrangement to protect the interest of the employees affected. The provisions referred to immediately above were included pursuant to the recommendations of the report of the Committee of Six (p. 30). There are no similar provisions in existing law.

Report No. 1217 from the House of Representatives, Committee on Interstate and Foreign Commerce, dated July 18, 1939, offered a substitute bill, and in a sectional analysis discussing section 8 thereof, entitled Pooling, Consolidations, Mergers and Acquisitions of Control in case of carriers by railroad, motor vehicle, and water, stated:

> * * * (4) Three additional paragraphs are added to renumbered paragraph (2) (corresponding to paragraph (4) of the present section 5). These additional paragraphs direct the Commission to give weight to the following considerations when passing upon any

> proposed transaction: * * * (4) the interest of the carrier employees affected. In respect of employees the Commission is directed to require as a prerequisite to its approval of any proposed transaction under this section "a fair and equitable arrangement to protect the interests of employees affected".

A letter dated January 29, 1940, from Commissioner Joseph B. Eastman, Chairman of the Legislative Committee, Interstate Commerce Commission, to the Chairman of the Senate Interstate Commerce Committee and the Chairman of the Committee on Interstate and Foreign Commerce of the House of Representatives, contained the following comment:

> A large proportion of motor carrier unifications involve the absorption of failing lines. Often the acquiring carrier is seeking only to obtain the operating rights and is not interested in the operations of the other carrier as a going concern. The requirement that we impose a condition for the protection of employees, to say nothing of the proviso in lines 5-10, would therefore have the effect of prohibiting many such transactions. Very often this would not benefit the employees, for, unless acquired by some other carrier, the line for which they are working will die. It would, however, penalize the owners of the operating rights. We think it wiser to make the authority discretionary rather than mandatory.
>
> As for the proviso, the object of unifications is to save expense, usually by the saving of labor. Employees who may be displaced should, in the case of railroad unifications, be protected by some such plan as is embodied in the so-called "Washington Agreement" of 1936 between the railroad managements and labor organizations.

Sections 5(2)(c) and 5(2)(f) appeared in their present form in Report No. 2832, dated August 7, 1940, from the Committee of Conference, and the statement of the managers on the part of the House accompanying said report contained the following comment:

SECTION 7. CONSOLIDATIONS, MERGERS, ACQUISITIONS OF CONTROL, ETC.

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4. The House amendment included a provision (the Harrington amendment) prohibiting approval of any transaction which would result in unemployment or displacement of employees, or in the impairment of their employment rights. There was no similar provisions in the senate bill. In lieu of this proviso, the following provision has been included in the conference substitute:

[Section 5(2)(f) in its present form is then quoted.]

The substitute proposal for the Harrington amendment, as recommended to the conferees by instruction of the House, provided in substance that in case of consolidations and other unifications involving carriers by railroads, the Commission should in its order of approval require fair and equitable arrangements to protect the interests of the railroad employees affected. This provision has been retained in the substitute amendment agreed upon in conference.

The instruction of the House also made the provisions of the amendment applicable to the case where another means of transportation was substituted for rail transportation proposed to be abandoned. This provision is omitted from the substitute adopted in conference. A consideration of the application of this provision was, in the judgment of the conferees, found to be impracticable of proper administration.

From the foregoing, it can be seen that the references to mandatory conditions for the protection of employees mean only railroad employees, and, in the letter from the Chairman of the Legislative Committee, Interstate Commerce Commission, to the Chairman of the Senate Interstate Commerce Committee, and the Committee on Interstate and Foreign Commerce of the House of Representatives, a definite distinction was drawn between the protection that should be afforded motor and railroad carrier employees. Had Congress intended to accord motor carrier employees the same protection granted railroad employees by section 5(2)(f), it would not have made the provisions of that section mandatory, while, at the same time, writing the discretionary provisions contained in section 5(2)(c). It is clear that section 5(2)(f), consisting of only three sentences, is limited to railroad employees, and, in this respect, contains no ambiguities. Any attempt on our part to interpret it as embracing motor carrier employees would be a usurpation of the congressional function of legislation.

## Conclusions

Although Amalgamated claims that the returning drivers are entitled to protection against any reduction of wages following the strike, we cannot find or conclude that any reduction has resulted from the transaction approved under section 5. Rather, the lesser wages of certain employees following the strike resulted from their own choice not to accept employment paying more than they were then earning. Labor conditions heretofore adopted by the Commission, whether for rail or motor carrier employees, have not and should not protect employees against the consequences of their own choice in refusing to make a change of residence. See, e.g., *Chesapeake & O. Ry. Co.—Control —Baltimore & O. R. Co.*, 317 I.C.C. 261, 286-87 (1962).

Based upon our examination of the legislative history of the Transportation Act of 1940, and the plain language of

the provisions of section 5(2)(c), which require that we give weight to "the effect of the proposed transaciton upon adequate transportation service to the public," and to "the interest of the carrier employees affected" we are, as previously indicated, convinced that the law does not *require* that we impose conditions for the protection of motor carrier employees. Section 5 does require us to consider all aspects of the transaction as they affect the public interest. This includes the effect on employees. And in determining whether employees should receive any protection or compensation for the adverse effect which a transaction has upon them, we must consider the size and financial resources of the carriers involved, the expanding nature of the motor carrier industry, and the high degree of transferability of motor carrier employees within the industry. With rare exceptions, motor carriers involved in section 5 transactions and their employees have been able to resolve their differences by mutual agreement. In no cases involving motor carriers have the protective conditions imposed gone beyond requiring the payment of severance pay to dismissed employees. See the *Short Line* and *Baggett* cases, *supra*. Although we have occasionally suggested voluntary consideration of the nature of the *Oklahoma* and *Burlington* conditions, they have not been, and, in our opinion, they should not be, in the absence of a congressional mandate similar to that contained in section 5(2)(f), imposed in motor carrier proceedings unless compelling reasons so dictate. No such compelling reasons are present here.

In determining whether conditions to protect or compensate employees adversely affected should be imposed, and the nature of such conditions, the estimated aggregate cost to the carrier or carriers in giving effect to the conditions is of importance in both rail and motor cases; and the financial condition of the carrier in relation to these estimated costs, has cometimes been the controlling element in decisions in abandonment proceedings under section 1(18)

of the act not to impose any such conditions. "We have refused to impose protective conditions in cases categorized as 'partial' abandonments by generally unprosperous carriers in the effort to reduce expenses and thereby preserve service to the public on their remaining lines'." *Maryland & P. R. Co. Abandonment*, 295 I.C.C. 719, 729. Our authority to impose employee protective conditions in abandonment proceedings, found by the United States Supreme Court to be implicit in section 1 of the act, but also to be discretionary, in *Interstate Commerce Commission* v. *Railway L. E. Assn.*, 315 U.S. 373, is similar to our discretionary power as to employees in motor carrier transactions under section 5. We have previously found, and Amalgamated apparently agrees, that the only employees adversely affected by these transactions were those of American. All were reemployed by American, none having been discharged. The extent of the adverse effect on the 22 drivers involved consists of the expenses incurred in moving their households, loss of pay while moving, temporary maintenance of two households, and increased rents and utility costs.

The record before us shows that, for the years 1953 through the first 8 months of 1958, American suffered operating losses of $1,067,211, $136,824, $39,494, $62,782, $392,494, and $523,992, respectively, or an aggregate loss of $2,222,797. During this period of deficit operations, American was undergoing reorganization[5] and was operated by a trustee from February 10, 1954, through September 22, 1958. Its monthly cash requirements approxi-

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[4] "We have declined, without exception, to impose conditions for the protection of employees where an entire railroad system is being abandoned." *Texas Electric Ry. Co. Abandonment*, 271 I.C.C. 391. "A departure from this principle in particular cases must be supported by clear and convincing evidence." *Okmulgee Northern Ry. Co. Abandonment*, 320 I.C.C. 637.

[5] *Transportation Properties, Inc.—Control, 75 M.C.C. 471.*

mated $800,000, and its only source of funds was from borrowing or the sale of portions of its properties. Although the financial impact which the imposition of the conditions sought by Amalgamated would have on American is by no means clear, it could well impose a substantial burden. The general public interest is paramount to that of either the carrier or the affected employees. Not only the traveling public, but the employees as well, will benefit in the long run if American is permitted to operate and improve its financial condition without burdensome conditions. However, and notwithstanding the precarious financial condition of American shown of record, after careful further consideration of all the facts and circumstances, and in light of the Court's opinion, we believe that a portion of the benefits and economies which American reasonably might expect to achieve through the sale of the operations here involved should be used to compensate those 22 employees shown to have been adversely affected, in the form of a lump-sum payment approximately equal to the costs incurred in moving their households as above outlined.[6] The record does not reflect estimates of those costs, which can be ascertained only on the basis of information supplied by the respective drivers.

Upon reconsideration, we find that the findings in the prior report on further hearing, 90 M.C.C. 173, decided March 26, 1962, should be modified and supplemented, in accordance with the discussion herein, and by the imposition of the following condition to the authority granted, and that the said findings should be affirmed in all other respects:

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[6] It may be that certain "bumped" drivers were collaterally affected, but the adverse effect, if any, seems impossible to ascertain minor in extent, and difficult to attribute to this transaction rather than to the strike or other personnel adjustments. It is unnecessary and inappropriate to provide benefits to them.

*provided, however,* that any of the 22 driver employees of American Buslines, Inc., who were forced to incur expenses in moving their households because of reassignments made as a result of the transactions herein authorized, including loss of pay while moving, temporary maintenance of two households, and the excess of rents and utilities costs paid for a period of one year after the date of such reassignment, shall be paid a lump-sum settlement by American Buslines, Inc., approximately equal to the amount of such costs; and, in the event of any dispute or controversy arising with respect to the protection afforded by the foregoing condition, which cannot be settled by the carrier and employee, or his authorized representative, within 30 days after the controversy arises, it may be referred, by either party, to an arbitration committee for consideration and determination, the formation of which committee, its duties, procedure, and expenses, shall be agreed upon by the carrier and employee, or his duly authorized representative.

An appropriate order will be entered.

COMMISSIONER FREAS, whom CHAIRMAN GOFF and COMMISSIONER BUSH join, dissenting in part:

In no case involving motor carriers have we gone beyond requiring the payment of severance pay to displaced employees. A departure from this principle should rest upon clear and convincing evidence. The facts in this case fail to show unequivocally that the adverse effects suffered by the involved employees were caused solely or primarily by the purchase transactions. Indeed, the facts indicate rather that the pecuniary losses suffered by the employees may in large measure be attributed to the employees themselves.

Upon the facts in this case, I would not impose any employee protective conditions.

COMMISSIONER HUTCHINSON whom COMMISSIONER TUCKER joins, dissenting in part:

I disagree with the majority report to the extent that it is determined that the employees have been adversely affected as the result of the transactions.

The evidence indicates (1) that following the strike the drivers were scattered all over the country, (2) that there was a shortage of drivers in the eastern district, (3) that American offered jobs in the eastern district to the 22 employees who returned to work for American, and (4) that those who accepted the proffered employment earned more after the strike than they did before the strike. In view of these facts and the impossibility of separating those effects caused by the strike and its termination from those flowing from the transactions, I am not convinced that the employees have been adversely affected as a result of the transactions. I would, therefore, affirm the ultimate findings in the report of March 26, 1962, and I would not impose protective conditions.

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## APPENDIX C

Section 5(2)(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made,

it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

Section 5(2)(c). In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

* * * * * * * * * *

Section 5(2)(f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable

arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

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